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## Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives

**ABSTRACT.** Legal rules and regulations are routinely rationalized by appeal to the incentives they create. This Note examines an important but misunderstood fact about incentives—namely, that they often “crowd out” the natural motivations that citizens have to engage in socially valued behavior, such as a sense of civic duty, a commitment to personal growth, and charity towards others. The “crowding out effect” of incentives has traditionally been viewed as problematic because of cases where it renders incentives counter-productive—when fear of legal sanction or desire for financial reward substitutes for other forms of motivation in agents, this often leads to less of the socially valued behavior regulators sought to incentivize. In contrast, I explore whether the effect of legal incentives on our motivational psychology might be inherently regrettable in some cases, quite apart from the effect on behavioral outcomes. I show that a normative reframing of the crowding out effect that takes seriously the inherent value that resides in our “higher motives” generates novel insights into a variety of legal phenomena, including doctrinal rules in intellectual property, contracts, and torts; and a neglected theory for legal reformation, one that bears on the choice between rule- and standard-based legal directives and on the strategic use of the law to improve the way citizens conceptualize their obligations to each other.

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## INTRODUCTION

*Capacity for the nobler feelings is in most natures a very tender plant, easily killed, not only by hostile influences, but by mere want of sustenance . . . . Men lose their high aspirations as they lose their intellectual tastes, because they have not time or opportunity for indulging them; and they addict themselves to inferior pleasures, not because they deliberately prefer them, but because they are either the only ones to which they have access or the only ones which they are any longer capable of enjoying.*

—John Stuart Mill<sup>1</sup>

A powerful principle underlies much contemporary legal analysis and regulatory design. The principle is that of the “incentive”—an extrinsic prompt that induces agents to act in ways they might not otherwise by altering the expected consequences of their actions. Often taking the form of financial reward or punitive sanction, incentives do their work by raising the costs of socially undesirable behavior or the benefits of socially desirable behavior. Incentives thus compensate for the inadequacy of individuals’ natural motivations to behave in socially desirable ways and, unsurprisingly, pervade contractual rules, tort duties of care, tax regulations, and virtually all other areas of the law.

Despite the widely acknowledged benefits of generating incentives for good behavior through the law, scholars have raised concerns about their pervasive use.<sup>2</sup> One category of concern stems from the unintended costs of motivating individuals by way of extrinsic prompts. A substantial body of empirical research has shown that in many contexts individuals lose their natural or “intrinsic” motivations for engaging in an activity when they are successfully induced to participate in it for extrinsic reasons, like monetary reward or fear of sanction.<sup>3</sup> Motivation grounded in a sense of civic duty, or a commitment to self-improvement, or moral concern, appears undermined in the presence of monetary and sanction-based incentives. Extrinsic motivation is said to “crowd out” intrinsic motivation, and the phenomenon is commonly referred to as the “crowding out effect.”<sup>4</sup>

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1. JOHN STUART MILL, UTILITARIANISM 10–11 (George Sher ed., 2d ed. 2001) (1861).

2. See sources cited *infra* note 5.

3. See *infra* Section II.B.

4. See, e.g., Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURV. 589, 590 (2001).

In this Note, I explore a normative dimension to the crowding out effect that has been neglected by previous scholarship. The crowding out effect, as traditionally conceived, portrays legal incentives as potentially counter-productive; the net decline in intrinsic motivation often makes agents *less* likely to engage in the activity regulators hoped to incentivize.<sup>5</sup> One might say that the traditional conception of the phenomenon renders an *internal* critique of legal incentives, one that questions whether incentives adequately satisfy their purpose. There is a different way of regarding the crowding out phenomenon, one that suggests an *external* critique of incentivizing, and it is this alternative that I hope to develop in what follows.

I argue that quite apart from the effect on behavioral outcomes, the erosion of intrinsic motivation is often worth regretting for its own sake. When an increasing number of our actions are done for monetary reasons, or out of a fear of punishment, and when this renders vulnerable such wellsprings of motivation as a sense of fairness or a commitment to personal growth, the effect on our values and motivational psychology is *inherently* bad.<sup>6</sup> This

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5. See Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1152 (2010) (“[I]n some cases offering monetary rewards to whistle-blowers will lead to less, rather than more, reporting of illegality.”); Yuval Feldman & Oren Perez, *Motivating Environmental Action in a Pluralistic Regulatory Environment: An Experimental Study of Framing, Crowding Out, and Institutional Effects in the Context of Recycling Policies*, 46 LAW & SOC’Y REV. 405 (2012) (assessing the influence of extrinsic incentives on intrinsic motivations to recycle with the goal of designing the most efficient recycling policy); M. Todd Henderson & Frederick Tung, *Pay for Regulator Performance*, 85 S. CAL. L. REV. 1003, 1057-58 (2012) (positing that incentive pay could decrease the quality of bank examiners); Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 338-39 (2001) (discussing crowding out effects and arguing that “the advent of incentives will produce[] less, not more, of such [desirable] behavior”); Ernst Fehr & Simon Gächter, *Do Incentive Contracts Crowd Out Voluntary Cooperation?* 2 (Univ. of S. Cal. Law Sch. Ctr. for Law, Econ. & Org., Research Paper No. Co1-3, 2001), [http://papers.ssrn.com/abstract\\_id=229047](http://papers.ssrn.com/abstract_id=229047) (“[Incentive contracts] are on average less efficient and elicit less effort from . . . agents, than contracts that do not provide any incentives at all.”). Even those authors who question the extent of the crowding out effect take the same instrumentalist perspective. See Rebecca Hollander-Blumoff, *Intrinsic and Extrinsic Compliance Motivations: Comment on Feldman*, 35 WASH. U. J.L. & POL’Y 53, 54 (2011) (focusing on the question of how crowding out effects can be countered with larger penalties); Adam Oliver & Lawrence D. Brown, *Incentivizing Professionals and Patients: A Consideration in the Context of the United Kingdom and the United States*, 36 J. HEALTH POL. POL’Y & L. 59, 82-84 (2011) (noting that policymakers designing incentives for health-care professions should be aware of the potential for crowding out, “[a]lthough the evidence on the crowding-out of good practice is mixed”).
  6. Michael Sandel, in a recent work, has appraised the crowding out effect of *monetary* incentives with a similar emphasis on the harm inherent in motivational change. See

normative conclusion is unaffected by the finding that extrinsic motivation is more effective in driving socially desirable behavior. Socially optimal behavior, under an incentives regime, may come at the cost of individuals failing to develop a diverse and sufficiently rich set of reasons for acting. The existing literature on the crowding out effect has failed to take seriously the possibility that the character of our motives matters quite apart from the behavioral ends that motives enable.<sup>7</sup>

I demonstrate that the neglected moral dimension to the crowding out effect has important consequences for widely debated questions of law and policy. A normative framework that recognizes that legal incentives often undermine motivations inherently worth preserving can be brought to bear on the analysis of doctrinal rules in intellectual property, contracts, and torts. Moreover, it sheds insight into the comparative performance of rule- and standard-based legal directives, and the potential for using the law as a means for moral education. The framework I develop is thus geared towards emphasizing a normatively salient feature of the effect that laws have—a feature that bears on important policy questions, but remains ignored in debates about what the law should be.

The structure of the Note is as follows. In Part I, I introduce the theory of incentives. I discuss the economic models of rational decision making that underpin the theory, and provide examples of regulations informed by the incentivizing approach. I introduce, in Part II, the crowding out phenomenon as traditionally conceived. I refer to both the theoretical and empirical considerations underpinning the view that incentives crowd out intrinsic motivation.

The Parts that follow represent my contribution to the literature. In Part III, I develop an original version of the crowding out critique of incentives. I

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MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 45-46 (2012). I distinguish my view from Sandel's below. See *infra* note 72.

7. Indeed, even scholars with a more general interest in the effect of law on norms have stayed true to the traditional approach: the interest in norms is motivated by an interest in their effectiveness at getting us more of the behavioral outcomes we care about. See, e.g., Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423 (2002); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 72 (2003) (“[M]anipulating material incentives may not only be an inefficient regulatory strategy for solving collective-action problems; it may often be a self-defeating one.”); John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L.J. 203, 214-15 (2008) (observing that financial incentives are unlikely to be effective at motivating “amateur creators” to create art); see also *infra* Section II.C (reviewing the existing scholarship’s instrumental interest in the crowding out effect).

explain how our motivations can be distinguished, descriptively and morally, and why having the right motives matters from the agent's perspective. I argue that incentives interfere with our individual aspirations to be the best versions of ourselves because our considered preferences regarding our ideal selves are irreducibly preferences over motives and ways of valuing things in the world. Furthermore, certain valued ways of relating with others positively require that individuals cultivate and routinely give expression to motivations like kindness and reciprocal respect. Incentives interfere with the cultivation of such forms of motivation.

Then, in Part IV, I demonstrate how the moral insights gleaned in Part III have practical value for lawmakers. One set of examples proceeds from the observation that existing legal doctrines evince a reluctance on the part of lawmakers to implement legal incentives in certain spheres of human activity—for instance, those involving scientific enterprise, marital relations, and gift-giving. This disinclination finds a partial explanation (or normative justification) in the importance of motive-preservation: certain valued ways of caring should not be undermined by the law. The examples discussed include the “law of nature” restriction on patentable subject matter, the unenforceability of donative promises that have not been relied upon, and the declining reputation of heart balm laws. Next, I show that the theory generates insights into the trans-substantive debate over the choice between bright-line rules and open-textured standards as legal directives. I argue that a neglected benefit of using standards as a legal form is that, in certain contexts, standards mitigate the crowding out effect by giving private actors a chance to exercise their intrinsic motives and higher interests. Standards thus are advantageous in domains governed by the law where we think it is important for individuals to cultivate good character. I illustrate this principle using examples of standards in Fourth Amendment search-and-seizure doctrine, trade secret law, and the Federal Rules of Civil Procedure. Finally, I make brief note of how the law can be employed strategically, on account of its effect on motivation, to improve the way citizens conceptualize their obligations to each other, using the example of the tax code's incentive effects. It bears emphasizing that I do not purport to offer complete causal explanations or normative justifications of the legal phenomena I analyze. Rather, the examples I discuss are illustrative of the potential for a normative theory that reframes the crowding out effect in the manner I propose to generate new and powerful (if incomplete) insights into the law.

As a final introductory remark, it is worth emphasizing at the outset that this Note is not intended as a jeremiad against incentives, market norms, or excessive regulation. It is, rather, an attempt to show how we can put to work, in a hardheaded manner, an important yet ignored moral insight regarding the

use of legal incentives (which undeniably do a lot of good for society). One of my chief purposes in opening with the quote of Mill, the great advocate of utilitarianism, is to convey that my normative arguments will have a certain flavor that economists and progressive regulators might find attractive.<sup>8</sup> Where others have appealed to under-analyzed notions of “sanctity” and “corruption” to explain why motivating agents to do certain kinds of things (donate organs, for instance) destroys the good in the achieved outcomes, I do not seek to undermine the value inherent in socially desirable behavior even when it transpires under an incentives regime. The question of whether the outcome of an action is good for society can be separated from the question of what is good for the agent engaged in the action; the latter question has to do with the kinds of persons we want to be. This Note offers a meditation on the role of the law in enabling or inhibiting our self-realization.

## I. LAW AND THE THEORY OF INCENTIVES

In this Part, I discuss the theory of incentives, and the economic models of rational decision making that undergird it. I offer examples of the ways in which the theory has been applied to the law and the regulations it has inspired.

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8. The views I develop here should also be of special interest to scholars contributing to the development of “virtue jurisprudence”—an approach to the law that draws on “virtue ethics” and its emphasis on character to develop theories of judging, see, e.g., Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 *METAPHILOSOPHY* 178 (2003), analyses of legal standards of prudence and care, see, e.g., Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 *CHI.-KENT L. REV.* 1431 (2000), and general justifications of legal requirements and prohibitions, see, e.g., Sherman Clark, *Neoclassical Public Virtues: Towards an Aretaic Theory of Law-Making (and Law Teaching)*, in *LAW, VIRTUE, AND JUSTICE* 81 (Amalia Amaya & Ho Hock Lai eds., 2012). I share the virtue ethicist’s sense of the importance of the agent’s character as a component of her wellbeing, although I believe that the importance of virtue—or, given my focus, good motives—can be captured within a traditional consequentialist or deontological moral framework, without recourse to a “third way” in ethics. More importantly, I draw attention in this Note to a feature of the effect that laws have that existing scholarship in the virtue-jurisprudential tradition has ignored despite the fact that this feature—namely, the motivational transfer that legal incentives cause—can be normatively evaluated out of a concern for character. I highlight new ways in which the law can promote traits associated with virtue (by getting out of certain domains of human endeavor, by using standard-based legal directives, and by strategically crowding out motives that are less than virtuous). See *infra* Parts III–IV.

### A. *An Economic Approach to Human Behavior*

A simple yet powerful model of human behavior underlies modern microeconomics, and it has been productively applied to a number of contemporary social problems. This model—dubbed the “rational actor model” of human behavior—supposes that individuals, in deciding which course of action to take, assess the costs and benefits of possible actions and act so as to maximize their expected benefits. In his seminal piece *The Economic Approach to Human Behavior*, Gary Becker observed that the rational actor model has helped characterize and explain behavioral outcomes not only in those spheres of human conduct traditionally understood to be amenable to economic analysis—such as buying and selling in markets—but also in such unconventional spheres as marriage.<sup>9</sup>

Two features of the approach are worthy of emphasis. One important feature is the way that the cost-benefit framework simplifies the preferences of individuals. Economists, of course, recognize that behavior is driven by a much richer set of values and preferences than the cost-benefit dichotomy implies. Individuals might act out of a sense of moral duty, or filial loyalty, or a desire for truth and beauty. Nevertheless, economists make the simplifying but useful assumption that individuals ultimately combine the goods and bads as they see them into a single expected utility function, and act so as to maximize that function. The goods and bads in the world, whether viewed as such out of a sense of moral duty or a love of money, are added up and weighed against each other to determine the overall payoff of a course of action. The second relevant feature of the economic approach to human behavior is the focus on outcomes of individual choices. The theory is geared towards predicting how people will act, and interrogates how the payoff structure facing agents should be managed in order to generate more of the behavioral outcomes we care about. The theory suggests that regulators should focus on deterring individuals who are inclined towards types of conduct we deem socially undesirable by increasing the costs of engaging in that type of conduct. Alternatively, regulators should deploy the instruments of social policy to artificially increase the benefits derived from engaging in socially desirable behavior.<sup>10</sup>

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9. See GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 8, 17 (1976).

10. See, e.g., IAN AYRES, *CARROTS AND STICKS: UNLOCK THE POWER OF INCENTIVES TO GET THINGS DONE* (2010); STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (2005); N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 7 (6th ed. 2012).



The rational actor model and the incentivizing logic it inspires result in a policy focus on generating incentives to compensate for the inadequacies of our natural instincts. As Samuel Bowles puts it, “the burden of good governance shift[s] from the task of cultivating civic virtue to the challenge of designing institutions that work tolerably well in its absence.”<sup>11</sup>

*B. The Law as an Engine for Incentives*

The incentives approach has revolutionized legal theory. Contractual rules, property rights, and tort duties of care are routinely rationalized by appeal to the ways in which they incentivize individuals with self-regarding preferences to implement outcomes that are socially valued, but may not be sought absent the relevant rule. Contracts are enforced against promisors who breach when doing so creates legal incentives for contractual reliance in a way that maximizes the surplus associated with contractual arrangements.<sup>12</sup> The patent regime is defended by appeal to the increased number of inventions that become available to society due to the incentive effects of granting monopoly rights for new inventions.<sup>13</sup> Tort law—in particular, the ways in which the regime imposes costs on individuals via damages—is conceptualized as a system for incentivizing potential injurers and victims to minimize the cost of accidents by optimally investing in safety.<sup>14</sup>

Many federal and state statutes have also been designed with an eye towards the incentives they create. Deliberate incentives can be found in tax

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11. Samuel Bowles, *Machiavelli's Mistake: Why Good Laws Are No Substitute for Good Citizens*, SANTE FE INST. & U. SIENA 3 (2010), <http://www.santafe.edu/~bowles/Machiavelli.pdf>.

12. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 556 (2003).

13. See, e.g., Petra Moser, *How Do Patent Laws Influence Innovation? Evidence from Nineteenth-Century World Fairs 1* (Nat'l Bureau of Econ. Research, Working Paper No. 9909, 2003), <http://www.nber.org/papers/w9909.pdf> (“Patent laws are designed to create the optimal incentives for innovation . . .”).

14. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); see also Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (determining optimal enforcement of criminal laws using economic principles).

regulations,<sup>15</sup> environmental laws,<sup>16</sup> and rules designed to financially compensate and thereby encourage whistleblowing.<sup>17</sup> In Dallas, Texas, second graders received payments for reading books to incentivize positive educational outcomes.<sup>18</sup> In the United Kingdom, the Ministry of Justice introduced a program that pays prisons based on how well they rehabilitate offenders.<sup>19</sup> Unsurprisingly, many find such initiatives controversial.<sup>20</sup>

## II. THE CROWDING OUT EFFECT: THEORY & EVIDENCE

In this Part, I discuss evidence suggesting that legal incentives can in some cases erode a person's "intrinsic" motives to engage in a course of action, whether those motives stem from a sense of civic duty, a sense of fairness, or other personal commitments. I describe, first, the psychological theories that purport to explain why the "crowding out effect" occurs, and, second, the relevant experimental data.

### A. *When Incentives Do the Work of Intrinsic Motivation: Crowding Out Theory*

Actions can be undertaken for a variety of reasons. It is widely recognized that motivations for following the law, for instance, are diverse, and range

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15. See, e.g., Sean M. Stegmaier, *Tax Incentives for Higher Education in the Internal Revenue Code: Education Tax Expenditure Reform and the Inclusion of Refundable Tax Credits*, 37 SW. U. L. REV. 135, 137 (2008) (noting incentives in the tax code).
  16. See, e.g., Adam Babich, *A New Era in Environmental Law*, 20 COLO. LAW. 435, 435 (1991) (noting laws intended to create environmental incentives).
  17. See, e.g., Feldman & Lobel, *supra* note 5, at 1168-72 (studying whistleblowing statutes and the incentives they create).
  18. See Amanda Ripley, *Should Kids Be Bribed to Do Well in School?*, TIME, Apr. 8, 2010, <http://www.time.com/time/magazine/article/0,9171,1978758-3,00.html>.
  19. See Andrew Neilson, *Counterblast: Putting a Price on Rehabilitation: Payment by Results and the March of the Market in Prisons and Probation*, 51 HOW. J. CRIM. JUST. 419 (2012). Economists have proposed increasingly sophisticated incentivizing devices. See, e.g., Michael Abramowicz & Ian Ayres, *Compensating Commitments: The Law and Economics of Commitment Bonds that Compensate for the Possibility of Forfeiture* (May 10, 2010) (unpublished manuscript), <http://ssrn.com/abstract=1612396>.
  20. See, e.g., SANDEL, *supra* note 6, at 43, 79-80 (noting criticisms of programs that pay drug-addicted mothers to undergo sterilization and those that allow hunters to pay large sums to hunt an endangered rhino); Neilson, *supra* note 19.

from an internalized sense of duty to a fear of sanctions.<sup>21</sup> A driver may obey speed limits to avoid a traffic ticket, or out of respect for the legal system, or some combination of both. Psychologists often distinguish motivations that are “intrinsic” from those that are “extrinsically” driven. Edward Deci states that “[o]ne is said to be intrinsically motivated to perform an activity when he receives no apparent rewards except the activity itself.”<sup>22</sup> Extrinsic motivation to engage in a course of action locates the action’s payoff externally—such as payments to be received from an interested third party in return for performance of the act. The intrinsic-extrinsic divide may be difficult to apply at the margins, but it is a firmly established distinction in the social sciences.

Legal incentives, paradigmatically, take the form of an extrinsic prompt—they produce extrinsic motivation in the agent by making a course of action more attractive through the promise of monetary payments or the threat of sanction. A number of theorists have suggested that incentives compete with or “crowd out” the agent’s intrinsic (or otherwise non-legal) motivation to engage in an activity.<sup>23</sup> The phenomenon has acquired a number of different names in the literature, reflecting subtle differences in the way it has been conceptualized, including the “crowding out effect,” the “over-justification effect,” and the “corruption effect.”<sup>24</sup>

There are at least three competing theoretical explanations of the effect. According to “self-determination” theorists, individuals who are extrinsically motivated experience their actions as controlled by others, especially if the extrinsic prompt arises due to an identifiable third party. Over time, the experience of engaging in an activity for someone willing to reward performance or punish non-performance deprives actors of the sense that the activity can be an object of self-initiated choice, which in turn undermines their

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21. See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (observing that individuals are motivated to follow the law for a variety of reasons).

22. Edward L. Deci, *Effects of Externally Mediated Rewards on Intrinsic Motivation*, 18 J. PERSONALITY & SOC. PSYCHOL. 105, 105 (1971).

23. See, e.g., RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 314 (1997) (concluding that “the commercialization of blood and donor relationships represses the expression of altruism” and “erodes the sense of community”).

24. See generally *THE HIDDEN COSTS OF REWARD: NEW PERSPECTIVES ON THE PSYCHOLOGY OF HUMAN MOTIVATION* (Mark R. Lepper & David Greene eds., 1978) (reviewing literature on the crowding out effects of rewards).

tendency to exhibit intrinsic motivation.<sup>25</sup> An alternative view suggests that external rewards and punishments change the meaning of actions by making the agent overlook prior reasons for acting and by shifting her focus to a particular set of (extrinsic) considerations. In other words, “external rewards create an over-justification effect whereby people assume that their deeds are due to the external rewards and not owing to their intrinsic motivations.”<sup>26</sup> A third view suggests that extrinsic prompts deprive the individual of the chance to exhibit her intrinsic motivations to others, which, in turn, undermines the value to the individual of having intrinsic motives.<sup>27</sup> On this view, an inability to advance an impression of oneself as motivated by “higher values,” like truth and morality, diminishes the importance of having the relevant motivations. As a result of their inability, when incentivized, to reliably signal their intrinsic motives to others, agents exhibit what Bruno Frey calls “altruistic anger,” which involves a relinquishing of altruistic and other intrinsic motives altogether.<sup>28</sup>

The objective of this Note is not to settle which, if any, of the theories is correct. The theories presented are plausible explanations of the evidence to follow, and thus serve a useful contextualizing function. The arguments advanced in Parts III and IV—in particular, the argument that situates the crowding out effect within moral theory—do not depend on any particular view of the effect’s origins or underlying basis. Nonetheless, certain of the theories, if correct, should reinforce the moral points made in Part III more than others—especially a theory that locates the crowding out effect in the agent’s experience of herself as an autonomous agent.<sup>29</sup>

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25. Edward L. Deci & Richard M. Ryan, *The Empirical Exploration of Intrinsic Motivational Processes*, in 13 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 39, 43-44 (Leonard Berkowitz ed., 1980) (noting that rewards diminish intrinsic motivation by shifting the agent’s perceived locus of causality).

26. Yuval Feldman, *The Complexity of Disentangling Intrinsic and Extrinsic Compliance Motivations: Theoretical and Empirical Insights from the Behavioral Analysis of Law*, 35 *WASH. U. J.L. & POL’Y* 11, 24 (2011).

27. Bruno Frey, *Crowding Out and Crowding In of Intrinsic Preferences*, in *REFLEXIVE GOVERNANCE FOR GLOBAL PUBLIC GOODS* 75-78 (Eric Brousseau et al. eds., 2012).

28. *Id.*

29. See *supra* note 25 and accompanying text.

*B. Evidence for the Crowding Out Effect*

Natural experiments offer the most compelling illustrations of the crowding out effect. Uri Gneezy and Aldo Rustichini examined the effects of a day care center's introduction of a fine against parents who arrive late in picking up their children.<sup>30</sup> Traditional deterrence models, based on the rational actor assumptions of economic theory, would suggest that because fines increase the costs to parents of being late, they should lead to a reduction in the number of late pick-ups. Contrary to expectation, the number of late parents *increased* after the fine was introduced.<sup>31</sup> Gneezy and Rustichini considered the possibility that parents assumed that the fines were being paid to teachers who had to stay late to look after their children, and that they were purchasing a service rather than imposing a nuisance. The experimenters pointed out that such an explanation is difficult to square with the fact that the payments were described as "fines" and the increase in late parents *persisted* even after the fine was removed.<sup>32</sup>

Another experiment, reported by Bruno Frey and Felix Oberholzer-Gee, revealed the effects of incentives on the willingness of citizens to disproportionately bear the costs of a project desirable to the overall community.<sup>33</sup> The Swiss Parliament wanted to build a nuclear waste repository, which was widely recognized to be a worthwhile project, with considerable benefits for a number of localities. Individuals, however, were expected to resent the facility being built within their own locality, considering that it would entail their bearing more of the total cost than citizens living elsewhere. In other words, the building of the waste facility was a classic collective action problem, referred to in the literature as a Not in My Backyard (NIMBY) problem. In an effort to make the proposal more attractive, the government considered financially compensating those who agreed to put up with the repository. The region was widely surveyed, and the results showed that while half of the respondents who were not offered compensation agreed to have the facility built within their locality, the level of acceptance dropped to one quarter among those who were offered amounts ranging from \$2,175 to

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30. Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000).

31. *Id.* at 15.

32. *Id.* at 14.

33. See Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746 (1997).

\$6,525.<sup>34</sup> Frey and Oberholzer-Gee tested for the possibility that citizens' acceptance level declined because they inferred from the offer of compensation that the magnitude of harm caused by the facility was significantly greater, by asking respondents whether they thought the size of compensation was linked to the level of risk. Only six percent inferred such a connection. Excluding alternative explanations, the authors concluded that "public spirit" declined when the state attempted to buy out individuals. Monetary incentives crowded out intrinsic motivations to accept the project, such as a sense of civic duty.<sup>35</sup> A similar study has replicated this effect in Pennsylvania.<sup>36</sup>

In addition to these real-world experiments, scholars have extensively studied the crowding out effect, and the results have been widely replicated. Based on surveys of a panel of over two thousand employees, Yuval Feldman demonstrated that regulatory mechanisms that financially reward whistleblowers often lead to less, rather than more, reporting of illegal activity—such as tax evasion or fraudulent commercial practices—by undermining ethical motives to report.<sup>37</sup> Moreover, a number of meta-analytical studies have summarized the extensive empirical research on the crowding out effect.<sup>38</sup> A meta-analysis of 128 studies over three decades conducted by Edward Deci et al. concluded that the crowding out effect is a robust phenomenon, and many kinds of tangible rewards for socially desirable behavior undermine intrinsic motivation.<sup>39</sup>

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34. *Id.* at 749-50.

35. *Id.* at 753.

36. Felix Oberholzer-Gee & Howard Kunreuther, *Social Pressures in Siting Conflicts: A Case Study of Siting a Radioactive Waste Repository in Pennsylvania*, in *MANAGING CONFLICT IN FACILITY SITING: AN INTERNATIONAL COMPARISON* 85 (S. Hayden Lesbirel & Daigee Shaw eds., 2005).

37. See Feldman & Lobel, *supra* note 5; see also Yuval Feldman & Oren Perez, *How Law Changes the Environmental Mind: An Experimental Study of the Effect of Legal Norms on Moral Perceptions and Civic Enforcement*, 36 J.L. & SOC'Y 501 (2009) (noting that individuals are more tolerant of polluting behavior when it is fined or taxed); Frey & Jegen, *supra* note 4, at 598-600 (describing studies that suggest that incentive contracts crowd out reciprocity-based willingness to work).

38. See Frey & Jegen, *supra* note 4; see also Ernst Fehr & Armin Falk, *Psychological Foundations of Incentives*, 46 EUR. ECON. REV. 687, 709-10 (2002) (summarizing previous research in this area); Ernst Fehr & Bettina Rockenbach, *Detrimental Effects of Sanctions on Human Altruism*, 422 NATURE 137, 140 (2003) (same).

39. Edward L. Deci, Richard Koestner & Richard M. Ryan, *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 PSYCHOL. BULL. 627, 627 (1999); see also Edward L. Deci, Richard Koestner & Richard M. Ryan, *The Undermining Effect Is a Reality After All—Extrinsic Rewards, Task Interest, and Self-*

Crucially, for our purposes, the crowding out effect has not only been shown to occur through monetary incentives; prompts such as threats, surveillance, and deadlines also lead to the erosion of motives like ethical concern and a commitment to self-improvement.<sup>40</sup> For instance, in a classic and much discussed study, Richard Schwartz and Sonya Orleans demonstrated that emphasizing social norms and civic virtue had a greater effect on encouraging honesty in tax reporting than did threatening individuals with legal sanctions.<sup>41</sup>

Of course, legal prohibitions and rewards need not always have the crowding out effect, and in some cases may reinforce the perception that a form of conduct is intrinsically worth doing.<sup>42</sup> For instance, scholars have argued that sanctions that look more like punishments rather than prices are less likely to induce crowding out.<sup>43</sup> Relatedly, an act done out of a sense of legal duty is not always reducible to one performed merely out of a fear of legal sanctions. Respect for the law may be folded into such forms of classically intrinsic concerns as a sense of moral and civic duty. Nevertheless, the crowding out effect of sanctions and monetary reward is an observable and significant phenomenon.<sup>44</sup> The aim of this Note is not to tease apart cases in which crowding out does or does not occur, but to build a normative framework

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*Determination: Reply to Eisenberger, Pierce, and Cameron (1999) and Lepper, Henderlong, and Gingras (1990)*, 125 PSYCHOL. BULL. 692 (1999) (critically discussing independent meta-analyses of research on the crowding out effect conducted by various authors). *But see* Robert Eisenberger, W. David Pierce & Judy Cameron, *Effects of Reward on Intrinsic Motivation—Negative, Neutral, and Positive: Comment on Deci, Koestner, and Ryan (1999)*, 125 PSYCHOL. BULL. 677, 677 (1999) (observing that “reward can decrease, have no effect, or increase intrinsic motivation”). Bruno Frey and Reno Jegen find that the disconfirming studies by Eisenberger, Pierce, and Cameron have significant shortcomings. *See* Frey & Jegen, *supra* note 4, at 597–98.

40. *See* Frey, *supra* note 27, at 79 (“Intrinsic motivation is potentially affected by *all kinds of intervention* coming from outside the person considered. Thus, not only rewards, but also *commands* may crowd out intrinsic motivation.”); Richard M. Ryan & Edward L. Deci, *An Overview of Self-Determination Theory: An Organismic-Dialectical Perspective*, in *HANDBOOK OF SELF-DETERMINATION RESEARCH* 3, 12 (Edward L. Deci & Richard M. Ryan eds., 2002).
41. *See* Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 299 (1967).
42. *See, e.g.*, Feldman, *supra* note 26, at 15; Feldman & Lobel, *supra* note 5, at 1181 (“[T]here is a documented difference between small, intermediate, and high payoffs, such that intermediate payoffs trigger crowding-out effects most often.”); Yuval Feldman & Doron Teichman, *Are All “Legal Dollars” Created Equal?*, 102 NW. U. L. REV. 223, 225 (2008).
43. Feldman & Teichman, *supra* note 42, at 225.
44. *See* Frey & Jegen, *supra* note 4.

around the cases where it does. The fact that it often does, as the studies discussed demonstrate, is well established.

*C. The Traditional View of Why Crowding Out Is a Problem: Intrinsic Motives as Mere Means*

Policy interest in the crowding out phenomenon stems principally from the worry that it renders incentives counter-productive. Scholars have argued that in certain contexts the positive impact of incentives may be nullified by the erosion of intrinsic motivation, and that, as individuals stop acting out of a sense of good will or civic duty, this might even have the opposite result to what regulators intend.<sup>45</sup> For instance, Maarten Vansteenkiste et al. argue that in the educational context, experiments suggest that emphasizing the intrinsic value of learning activities “produces deeper engagement in learning activities, better conceptual learning, and higher persistence” than does motivating individuals through extrinsic rewards.<sup>46</sup> In the context of whistleblowing, Yuval Feldman and Orly Lobel observe that sometimes “financial incentives are not only unnecessary but are counterproductive and offset internal motivations to report.”<sup>47</sup> “Identifying such crowding out effects in regulatory design is particularly beneficial,” they suggest, “as it can save public dollars while simultaneously pointing to better mechanisms to induce reporting.”<sup>48</sup> The thrust of the mainstream policy argument for the significance of the crowding out effect is just that intrinsic motivation is sometimes *better* at achieving desired behavioral outcomes than extrinsic motivation.

In fact, even legal scholars who have an interest in the way that the law affects the norms of individuals quite apart from the crowding out effect have an instrumental perspective on the value of norms—one that emphasizes the consequences of social norms on such behavioral outcomes as compliance with the law.<sup>49</sup> Cass Sunstein, for instance, observes that “[f]ar too little attention

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45. See sources cited *supra* note 5.

46. Maarten Vansteenkiste, Willy Lens & Edward L. Deci, *Intrinsic Versus Extrinsic Goal Contents in Self-Determination Theory: Another Look at the Quality of Academic Motivation*, 41 EDUC. PSYCHOLOGIST 19, 19 (2006).

47. Feldman & Lobel, *supra* note 5, at 1207.

48. *Id.*

49. See, e.g., Mark F. Schultz, *Fear and Norms and Rock and Roll*, 21 BERKELEY TECH. L.J. 651, 720-22 (2006) (arguing that reinforcing norms of reciprocity and fairness is useful for promoting legal compliance); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L.



has been given to the place of norms in human behavior, to the relationship between norms and law, and to the control of norms as an instrument of legal policy.”<sup>50</sup> In particular, he emphasizes that influencing what individuals care about can improve social wellbeing—that using the law to modify what individuals are motivated by can have positive effects on dieting, sexual behavior, and drug-use. The focus, in other words, is on the instrumental value of regulating the motivational psychology of individuals.<sup>51</sup>

Another category of interest in the crowding out effect connects with the importance of intrinsic motivation—“levels of generosity, fairmindedness, and civic involvement”—to liberal institutions.<sup>52</sup> Samuel Bowles observes that social norms that generate intrinsic motivation stabilize the civic culture of liberal societies and engender supportive moral attitudes that contribute to the flourishing of democracy and rule of law. He emphasizes that public policies need to “account for the fact that moral motives are a fragile resource likely to be attenuated by explicit incentives,”<sup>53</sup> but does so from a consequentialist point of view—we care about the relevant sources of intrinsic motivation only for their effect on the stability of the liberal and economic institutions we care about independently.

What motivates existing literature on the crowding out effect is a highly *instrumental* view of the value of intrinsic motivation. Intrinsic (or otherwise non-legal) motives of agents matter, on the popular view, because they conduce to better learning outcomes, greater tax compliance, and more stability in liberal institutions. In the remainder of this Note, I develop a distinct view of the problem inherent in the crowding out phenomenon, and explain why theorists and lawmakers should pay attention to its neglected normative dimension.

While the basic intuition—that intrinsic motivation can be valuable to agents for its own sake—is quite explicit in the broader psychological literature, that intuition has not been explored in a systematic way to render a moral

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REV. 903, 907 (1996). See generally Yuval Feldman & Robert J. MacCoun, *Some Well-Aged Wines for the “New Norms” Bottles: Implications of Social Psychology for Law and Economics*, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR 358 (Francesco Parisi & Vernon L. Smith eds., 2005) (describing the interest in social norms for their effectiveness in promoting desirable behavior).

50. CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 34 (1997).

51. Sunstein, *supra* note 49, at 907-08.

52. Bowles, *supra* note 11, at 4-6.

53. *Id.* at 6.

framework for evaluating the crowding out effect (let alone one that is also geared towards legal application). For instance, Edward Deci and Richard Ryan demonstrate experimentally that being motivated intrinsically yields positive benefits for individual well-being, and that, conversely, when individuals feel extrinsically controlled it undermines their healthy psychological development.<sup>54</sup> Similarly, Julia Annas's work on the "phenomenology of virtue" observes that agents find the pursuit of goals that are treated as intrinsically valuable subjectively rewarding.<sup>55</sup> I am, of course, in agreement with the psychological literature on these points, and take the experimental work to reinforce the normative argument I advance. My argument for taking motives seriously, however, encompasses more than just the thought that being intrinsically motivated is experienced as rewarding by agents. In what follows, I try to show not only that we do have preferences regarding our motivations, but also that these preferences have a special sort of importance for us, tolerate normative scrutiny, and enjoy remarkable intersubjective agreement. Moreover, I go some way towards showing *why* we value various forms of intrinsic motivation in the way that we do. What is offered, in other words, is a more systematic philosophical grounding of the basic intuition—that the loss of intrinsic motivation can be harmful to agents quite apart from the effect on behavioral outcomes—and an attempt to fold it into an original analysis of the crowding out effect for purposes of legal design.

### III. WHY THE CHARACTER OF OUR MOTIVATIONS MATTERS: REFRAMING THE CROWDING OUT EFFECT

The harm that results from the crowding out effect sometimes inheres in the motivational transfer. This can be shown by appeal to the considered preferences of agents and the fact that certain valued relationships are constituted by specific modes of motivational concern. But first, I point to the ways in which motivations can be distinguished as a descriptive matter.

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- 54. Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, 55 AM. PSYCHOLOGIST 68, 68 (2000).
  - 55. Julia Annas, *The Phenomenology of Virtue*, 7 PHENOMENOLOGY & COGNITIVE SCI. 21, 29 n.22 (2008) (engaging with Mihaly Csikszentmihalyi's work, which observes that having intrinsic goals is experienced as rewarding by people); see also MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* (1991) (describing the uniquely pleasurable states achieved through intense absorption and heightened concentration during an activity).

*A. Grounds for Distinguishing Motivations*

There is a view that I suspect many are tempted by, according to which there is little that can be said in the way of distinguishing motives: beneath the surface diversity of desires and reasons for acting, one ultimately finds an unrelenting concern for the self. Debunking a monistic view about motivation—a view that claims, for example, that we are always motivated by what we perceive to be in our own self-interest—is important to the argument advanced in this Part, because the thought that the character of our motives matters morally presupposes that motivations can be descriptively distinguished. There is no more reason to think that our various desires are ultimately indistinguishable than there is to think that there is a single, unitary part of our brains that always lights up when we desire a thing.

The work of distinguishing motivations might begin with a distinction explored by the philosopher Bernard Williams, who pointed out that not every desire can be represented as the desire to avoid its own frustration.<sup>56</sup> Certain desires motivate agents in a way that renders the motive not merely one of avoiding the unpleasantness of not getting what one wants. In the grip of such desires, one wants to be released of the discomforts of desiring in a specific way. Consider my desire for financial security for my loved ones. It would be absurd to suggest that I would be indifferent between a world in which my loved ones are in fact financially secure and a world in which I am deluded into thinking that they are, or, for that matter, a world in which I no longer have the relevant desire. In contrast, some desires *do* render the desirer indifferent between two ways in which the desire might be satisfied. Consider a run-of-the-mill “itch”; I am genuinely indifferent between a world in which I am released of my desire to scratch my back through medical intervention or simulated relief, and a world in which I, in fact, scratch my back.

Desires can be distinguished on the basis of what they *aim* at (what they portray as desirable).<sup>57</sup> A desire for a state of affairs that proceeds from considerations of personal advantage can be distinguished from a desire that proceeds from values like concern for others, or a desire to know the truth. Whereas a self-regarding desire might “aim” at the actor’s own pleasure, an other-regarding desire “aims” at the good of others. To connect back with Williams’s point, the agent wants to be released of desires that aim at the good

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56. Bernard Williams, *The Makropulos Case: Reflections on the Tedium of Immortality*, in *LANGUAGE, METAPHYSICS, AND DEATH* 231 (John Donnelly ed., 1994).

57. See, e.g., T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 50–51 (1998).

of others in a very specific way—where the good of others in fact obtains. Not all desires portray pleasure or self-advancement as the good to be attained.<sup>58</sup> This truth is resilient to what the biological sciences or sociological investigation might tell us about why we desire such things as the good of others. Even if it was originally an association with pleasure that supported in us a desire for friendship and sociality, mere force of habit can turn that desire into one that portrays human companionship as desirable for its own sake.

A further fact about desires worth highlighting is that their lived experience varies. Caring about the good of others is phenomenologically unlike caring about the accumulation of wealth. To put the point in a flat-footed way, caring about the good of others *feels* different from caring about wealth accumulation—it involves a unique cluster of attitudes and emotions. Most of us should have introspective access to this important feature of our desires.

Finally, desires can be distinguished in terms of how robustly situated they are in the web of interests and preferences that constitute an identity. The more closely we identify with a desire, the less likely we are to accept the kind of personality transformation that rids us of the desire, notwithstanding the benefits of being released from the burdens of desiring, which include the discomfort experienced until desire-satisfaction, and the burdens that come from trying to satisfy the desire. Harry Frankfurt tracks the robustness of a desire relative to the degree to which it suitably meshes with other elements of an agent's psychology, such as her "second-order desires."<sup>59</sup> A first-order desire might take a particular action as its object, such as donating to charity, whereas a second-order desire is a desire for other desires. A first-order desire (a want to help others, say) backed by a second-order desire to have the first-order desire (a want to want to help others) enjoys, in a fairly intuitive sense, the agent's reflective endorsement, and becomes more central to her identity by virtue of its enhanced stability. Not all of our first-order desires enjoy our reflective endorsement in this way.

### *B. Motives, Self-Definition, and Orienting Oneself Towards the Good*

To recap, we can distinguish desires on the basis of what they portray as good or desirable, the extent to which desires cohere with other elements of an agent's motivational psychology, and desires as unique "lived experiences." On

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58. See *id.* at 80–90.

59. Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971).

the back of these distinctions, I motivate the view that cultivating certain ways of desiring is an intrinsic good.

In his masterwork on utilitarianism, John Stuart Mill defends a version of the view that all that matters, ethically speaking, is human pleasure (and its corollary: the absence of pain). But in doing so, Mill makes the following important qualification: *not all pleasures are created equal*.<sup>60</sup> Mill's defense of the qualification turns out to be quite illuminating for our purposes, though we need not share his ultimate conclusions—for instance, the conclusion that all that matters, ethically, is pleasure. Mill boldly asserts that were we to consult our own experiences, we would agree with him that certain pleasures are inherently better for us than other pleasures, and not simply in terms of the sheer *quantity* of pleasure experienced. The higher pleasures are privileged because of their richness—a richness purportedly apparent to those who have experienced them.<sup>61</sup>

There are two aspects of Mill's argument that are notable for our purposes. The first suggests a point about methodology—Mill recognized that normative claims are experienced as compelling when they connect with our own normative experiences. To persuade us that the pleasure derived from hard-earned intellectual or aesthetic achievements is superior to the pleasure derived from a back massage, he appeals to our own attitudes towards the two pleasures. The second notable feature of the argument is that Mill draws our attention to the phenomenology of distinct pleasures—what different pleasures are like experientially—to motivate a normative hierarchy of pleasures.<sup>62</sup>

My argument, here, is Millian. It appeals to introspective experiences that I expect the reader and I share. We make inter-subjective distinctions of worth amongst various desires and ways of valuing. We routinely exercise the capacity to examine our desires critically. We might celebrate our ethical concerns, for instance, or our intellectual interests, or our musical likes and dislikes, or our sports preferences. Even when we do endorse particular cares,

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60. MILL, *supra* note 1, at 8–10.

61. *Id.* at 8–9.

62. My argument partially shares this feature of Mill's. One way in which I motivate the idea that there are better or worse motivations is by observing that agents are capable of distinguishing, based on their own experiences, between preferred and less-preferred motivations, and there is considerable inter-subjective agreement about what motivations should be preferred. The way in which particular motivations (or, for that matter, particular pleasures) become objectively superior in light of our considered preferences implicates difficult questions in the metaphysics of value; I offer my all-too-brief answers to such questions *infra* note 72.

they are never fully immune to further challenge—although some desires and ways of valuing may tolerate scrutiny better than others. In other words, we have considered *preferences* regarding the kinds of motivated beings we want to be. I highlight, in what follows, that these preferences portray modes of motivation as desirable for more than just the behavioral ends they facilitate: we value our motivational concerns for the experiential richness that resides in having them, and certain desires cohere better with our independently held judgments of the good.

The first thing to say regarding the way in which motives can be an object of preference for agents is that what we care about bears on the experiential quality of our lives. In many cases, experiencing the object of one's desires as uniquely valuable contributes to the richness of a human life, a richness that we cherish and would regret losing. Some projects and interests have greater personal importance for us because the experience of having those interests is *itself* life enriching, and is part of what individuates us as unique human beings. We recognize that if we did not find music (or sports or philosophy) intrinsically desirable, we would be cut off from distinctive ways of experiencing the world, a fact that connects with the phenomenological distinguishability of different modes of desiring.<sup>63</sup>

Most people, I take it, would recoil at the idea of a life without what are widely regarded as virtuous motivations: a sense of moral duty, kindness towards others, or an interest in exercising our intellectual faculties. These forms of motivational concern are personally valued by agents at least in part for the experience of having them—being relevantly motivated constitutes the expression of capacities in us that we cherish, and having these forms of concern defines the kinds of people we perceive ourselves to be.<sup>64</sup> As a result of valuing these motivational capacities in ourselves in this way, we take pleasure in discovering similar capacities in our peers. We feel that the motivational capacities are good for them in the same way that they are good for us: they

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63. Note that where Mill asks us to focus on the experiential quality of pleasures generally, I am instead drawing attention to the specific (positive) experience of having desires we reflectively endorse, distinct from the pleasure derived from sating desires.

64. See generally CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 25-52 (1989) (discussing the way in which our identities are constituted by our basic evaluative commitments and identifications and the relationship between identity crises and normative skepticism); Frankfurt, *supra* note 59, at 10-12 (arguing that reflective self-evaluation, as manifested in the having of second-order desires, is partially constitutive of personhood and freedom of the will).

enrich our lives by conferring a uniquely attractive tenor to our subjective experiences.

Furthermore, we value virtuous modes of motivational concern (in ourselves and in others) for the way in which they correspond with our independent (and often inter-subjective) judgments of the good. What makes possessing the “virtues” like a love of knowledge or ethical concern intrinsically valuable to us connects with judgments of value that we make independently of them. Thomas Hurka observes that there are various things (other than motives) widely regarded by people as intrinsically good, like truth, knowledge, or the welfare of others, and, as a result, there are more or less *fitting* attitudes agents can take with respect to these basic things, given their status as goods.<sup>65</sup> Crucially, having the right kind of motivational attitude towards a basic good like social welfare—an intrinsic desire for it (one that portrays social welfare as desirable for its own sake)—becomes a distinct intrinsic good in virtue of social welfare’s normative status. That is to say, people who value social welfare or knowledge or personal achievement experience normative pressure to have an *intrinsic* desire for these things (and to value a similar desire in others), not merely because such desires conduce to more knowledge, or personal achievement, or social welfare, but because desiring the basic goods intrinsically is an appropriate attitudinal response to (and a way of recognizing) their status *qua* goods.<sup>66</sup> Our independently held values thus generate corresponding second-order desires in us to cultivate and nourish motives like love of knowledge and ethical concern for their own sake. When we discover similar motives in others, we reflect favorably on their capacity to recognize and be moved appropriately by what we regard as the good.

Hence, the cost of denying that there are motivations that are inherently better or worse for us is great. A denial would go against the force of our own experiences. The distinctions we make between better or worse values, even if bound up with our subjective ways of experiencing the world and our situation

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65. THOMAS HURKA, VIRTUE, VICE AND VALUE 11–15 (2001). While Hurka considers motivational/affective attitudes towards basic goods generally, I have focused on intrinsic desires for ease of discussion.

66. It is worth noting, at this juncture, the remarkable inter-subjective agreement that our normative evaluations routinely achieve. When a person fails to connect with and be moved by certain goods—truth, beauty, moral virtue—we are often able to persuade them to change their personal commitments, perhaps by clarifying what is, in their considered and reflective moments, important or valuable to them, or by correcting their false beliefs about the world.

in it, have tremendous importance for us individually and collectively.<sup>67</sup> Our cares bear on the quality of our lives, constitute our very identities, and determine whether we are appropriately oriented towards what we regard, in our considered moments, as the good.

*C. How Motives Enable Valued Ways of Relating with Others*

The argument of the previous Section shows that we have preferences regarding the kinds of motivated beings we want to be. The argument reveals that intrinsic motives can be valuable, quite apart from the behavioral outcomes they lead to; they are valued for the life-defining experience that is having them, and for their being fitting responses to what we independently value.

A different argument for why the character of our motives matters appeals to the role of motivation in enabling certain kinds of relationships between people. In what follows, I point to the fact that the very possibility of valued ways of relating with others depends on our having the capacity for certain ways of desiring. In other words, motivations matter because relationships matter. This does not amount to an instrumental account of the value of appropriate motivations, because the valued relationships are constituted by

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67. Philosophers have tried to explain the distinctions of worth we make in various ways. Under a view often ascribed to Plato, our judgments of the good are determined by our coming into contact with transcendent sources of the good, such as a timeless set of (non-natural) moral facts. See JOHN L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 23 (1977) ("In Plato's theory the Forms, and in particular the Form of the Good, are eternal, extra-mental, realities. They are a very central structural element in the fabric of the world."). Such a view will strike many as metaphysically implausible. More plausibly, others have argued that our normative distinctions are bound up with our subjective experiences of the world and our situation in it. See generally SIMON BLACKBURN, *RULING PASSIONS: A THEORY OF PRACTICAL REASONING* (1998) (arguing that normative evaluations can be authoritative even if grounded in our emotions and motivational concerns). As Harry Frankfurt puts it, the objectivity of normative truths

consists just in the fact that [they are] outside the scope of our voluntary control. Normative truths require that we submit to them. What makes them inescapable, however, is not that they are grounded in an external and independent reality. They are inescapable because they are determined by volitional necessities that we cannot alter or elude. In matters concerning practical normativity, the demanding objective reality that requires us to keep an eye out for possible correction of our views is a reality that is within ourselves.

HARRY G. FRANKFURT, *TAKING OURSELVES SERIOUSLY AND GETTING IT RIGHT* 34 (2006). My own view can be grounded in a similar metaphysics of value.



the relevant motivations. To put the point a different way, to value relationships is in part to value certain modes of motivational concern, not only in ourselves but also in others.

Take the case of friendship. For a friendship to obtain between two people, the attitudes that they have towards one another must have certain features.<sup>68</sup> Reciprocal affection, for instance, is widely regarded to be at the core of the kind of relationship a friendship is. But affection is hardly ever enough. Friends have standing intentions to help one another in difficult situations. Friends not only take pleasure in each other's company, they often share personal projects and interests. Moreover, the good of friendship—why we value it—is itself dependent on the kind of regard that friends bear towards one another; we value being around people who cherish us and with whom we share our personal commitments. This fact becomes especially vivid when we consider the ways in which friendships can become impaired. If a friend who once respected and cared for you becomes drawn to you for self-serving reasons—say, a desire to get ahead socially or profit financially—so much so that the original motives of love and respect are diminished, the change in feelings towards you would not only undermine the quality of the friendship, it would preclude, I think, the very possibility of a friendship. The fact of this impairment is independent of whether or not the person's actions change. All that needs to change to undermine a friendship are the motives behind the actions: the character of the internal regard.

To generalize from the friendship case, relationships involve (indeed, are constituted by) intentions and expectations regarding how parties feel towards one another, and the reasons they will be disposed to act upon.<sup>69</sup> Certain kinds of valued relations between individuals are made possible precisely because individuals have the capacity for projecting good will and proper respect towards one another.<sup>70</sup> Unsurprisingly, a number of moral philosophers have

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68. See T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME* 131-35 (2008) (discussing the norms of friendship).

69. *Id.*

70. For an example of valued relations between producers and consumers in market settings, see Schultz, *supra* note 49, at 675-91, which describes the relationship that the fans of the Grateful Dead are able to have with their favored musicians because of the norms of reciprocity that both parties have internalized—one characterized by trust, intimacy, and a sense of co-participation in the artistic enterprise. Schultz is ultimately interested in how this relationship leads to compliance with copyright law and seems to neglect that the relationship and its constituent motivational concerns might be inherently valuable to both parties.

grounded the obligation to be moral in the fact that when we cultivate basic forms of ethical regard for others, we make possible relationships in society that are intrinsically and immeasurably valuable.<sup>71</sup>

#### D. *An Incentive's Effect on the Motives We Care About*

The conclusions advanced in this Part so far—that the character of our motivations matters because (1) we think of motives as differentially valuable in their own right, for the way in which they enrich our lives and orient us towards the good; and (2) we have an interest in preserving certain valued ways of relating with others—provide us with all the resources needed to develop an external critique of incentives, one that focuses on the motivational transfer incentives cause.<sup>72</sup>

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71. See, e.g., SCANLON, *supra* note 68, at 139-41; see also PAUL WEITHMAN, WHY POLITICAL LIBERALISM?: ON JOHN RAWLS'S POLITICAL TURN 133-34 (2011) (describing Rawls's view that a desire to act on just principles is reinforced by the desire for friendship, association, and social harmony).

72. My view should be distinguished from those that have recently been developed by scholars working on the ethics of incentives. Michael Sandel, in his 2012 book, *What Money Can't Buy*, advances a thesis similar to my own. Sandel's basic idea is that "we corrupt a good, an activity, or a social practice whenever we treat it according to a lower norm [or motivation] than is appropriate to it." SANDEL, *supra* note 6, at 46. His discussion is grounded in the intuition that certain kinds of good activities—studying in school, say—are corrupted when we engage in them out of a desire for monetary gain as opposed to being motivated by higher values like a sense of the importance of learning for its own sake. Sandel does not appear to help himself to a systematic theory of what makes motives like ethical concern higher motives than desire for money. In contrast, I offer such a theory by appealing to the considered preferences of agents. A more subtle difference between Sandel's view and mine—but one that, I believe, makes my position more plausible—stems from the fact that Sandel conflates, or, at the very least, fails to clearly distinguish, a moral evaluation of the outcome of an incentivized act with an evaluation of the motives underpinning it. See *id.* at 45-46.

My view is also distinguishable from Ruth W. Grant's, as developed in her recent work on the topic. RUTH W. GRANT, STRINGS ATTACHED: UNTANGLING THE ETHICS OF INCENTIVES 57 (2012). While Grant seems attuned to some non-instrumental concerns raised by the use of incentives, her principal focus is on the way in which incentives can be instruments of power, and on the standards governing their legitimate use. *Id.* at 5-6. She rightly notes, for example, that motivating individuals through incentives often circumvents public discussion and consent, which seems contrary to democratic principles and the respect owed to free and rational persons. *Id.* at 7-56. She also notes that incentives can affect the character of the parties involved, and the way in which they do bears on their legitimacy. *Id.* at 51-52. Her account portrays the value of character in largely instrumental terms, however. *Id.* at 53, 114-116; see also Ruth W. Grant, *Ethics and Incentives: A Political*

As the studies discussed in Part II suggest, incentives alter our motivations, and they do so in a way that is not immediately noticeable to agents. The main psychological theories of the crowding out effect emphasize that an agent's capacity for intrinsic motivation depends on her sense of herself as capable of self-initiated choice, and on her attentiveness to intrinsic considerations as reasons for acting. A goal pursued out of a sense of its intrinsic worth offers an actor occasion to reflect on its being valued in this way—a mode of reflection that likely has an educative and fortifying effect.<sup>73</sup> Because extrinsic prompts direct the agent's attention away from such reflection and towards purely extrinsic considerations for acting, intrinsic motives are rendered vulnerable.<sup>74</sup> Moreover, the weakening of intrinsic motives can occur so gradually as to render agents oblivious to the change occurring in their personalities. After all, we do not constantly invigilate the immediate content of our mental life. Instead, we notice changes in habits or dispositions once the change in us is already entrenched. Hence, the motivational change that incentives cause by bypassing conscious reflection may result in a change in our desires that we cannot reflectively endorse as an improvement in our way of life.<sup>75</sup>

The proliferation of incentives through the law threatens to obstruct the cultivation of virtuous dispositions by blocking occasions for their habitual exercise, thereby rendering a shift in values that is difficult to endorse. Under an incentives regime, actions that might have provided individuals occasion to exercise (and reflect upon) a sense of civic duty, or moral regard, or other motivations that are generally held in high esteem, no longer do so because

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*Approach*, 100 AM. POL. SCI. REV. 29, 36 (2006) (noting that the undermining of character can lead to fewer altruistic acts). Grant's account would be considerably strengthened by a systematic explanation of why character might matter intrinsically.

73. See *supra* note 25.

74. The recognition that we fortify virtue through practice is, of course, a familiar thought. See ARISTOTLE, THE NICOMACHEAN ETHICS 1103B (H. Rackham ed., 1934) (c. 384 B.C.E.) (“[I]t is incumbent on us to control the character of our activities, since on the quality of these depends the quality of our dispositions.”).

75. As Harry Frankfurt observes, our ability to form a division in our minds, to step back from our desires and reflect on them, entails the possibility that we may not “approve of what we notice ourselves feeling . . . [or] want to remain the sort of person we observe ourselves to be . . .” FRANKFURT, *supra* note 67, at 171. Circumstances that shift the motives of agents in a direction we think they would, in their reflective moments, bemoan, are regrettable for that reason. See, e.g., Kennon M. Sheldon et al., *The Independent Effects of Goal Contents and Motives on Well-Being: It's Both What You Pursue and Why You Pursue It*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 475, 476 (2004) (observing that extrinsic control affects well-being negatively).

agents are redirected into acting out of a fear of sanction or a desire for monetary gain. When extrinsic legal considerations become a person's reasons for acting, they deprive her of the experience of desiring personal achievement, knowledge, and general welfare for their own sake—an experience that, as noted, is crucial to the fortification of intrinsic motivation. The resulting erosion in virtue generates a real risk of impoverishing the lives of individuals and the relations they hope to realize with their fellows. The danger under an incentive regime is a transition in the personal commitments of agents that cannot be understood either as deliberately chosen or as normative progress.<sup>76</sup>

Consider, for example, the Dodd-Frank Act,<sup>77</sup> which creates significant financial incentives for whistleblowing by employees when employers are engaged in fraudulent or otherwise wrongful behavior.<sup>78</sup> If the incentives created by the Act crowd out ethical motives to blow the whistle on wrongdoing—a serious possibility, as the evidence suggests<sup>79</sup>—it renders persons engaged in commerce even more beholden to financial interests, a fact that might be genuinely regrettable to them. By shutting down a means for cultivating a sense of commercial decency, the law diminishes ethical behavior engaged in for its own sake. Similarly, the tax regime, in an ostensible effort to incentivize charitable donations, offers taxpayers a financial benefit in return for their largesse: the charitable deduction allows the donor to reduce her tax liability by sheltering part of her income relative to the amount of her donation.<sup>80</sup> In fact, taxpayers can generate direct monetary gains as a result of the charitable deduction rule, through a series of transactions incorporating a charitable gift as an element.<sup>81</sup> The tax benefits of charitable donations thus generate an additional legal reason for donating to charity, and this added

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76. On the importance to the agent of understanding new norms and motivations as normative progress, see TAYLOR, *supra* note 64, at 72, which explains that “[w]e are convinced that a certain [normative] view is superior because we have lived a transition which we understand as error-reducing and hence as epistemic gain.”

77. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of U.S.C.).

78. Ben Kerschberg, *The Dodd-Frank Act's Robust Whistleblowing Incentives*, FORBES, Apr. 14, 2011, <http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives>.

79. See Feldman & Lobel, *supra* note 5, at 1151-52 (“[T]he findings indicate that in some cases offering monetary rewards to whistle-blowers will lead to less, rather than more, reporting of illegality.”).

80. See 26 U.S.C. § 170 (2006).

81. Wendy C. Gerzog, *From the Greedy to the Needy*, 87 OR. L. REV. 1133, 1135 (2008).

reason may be enough to regrettably alter the motivations of those who would have otherwise donated exclusively out of a sense of altruism. Those habituated into thinking of charitable donations as a means for personal gain may fail to cultivate ideal levels of generosity and good will or, alternatively, cheapen their mode of relating to their beneficiaries.

I will say more about the legal application of the moral insights canvassed in this Part, but for now it suffices to note that the law's influence on our motivations for acting can be normatively evaluated quite apart from any ultimate effect on behavioral outcomes. By shifting our norms, the legal system potentially disables us from realizing the idealized versions of ourselves, and impairs relationships that are worth preserving. One conclusion of this line of thinking is that not pushing or prodding private actors may afford them the best opportunities for cultivating habits and motivations we care about.

#### IV. IMPLICATIONS FOR LAW AND REGULATORY DESIGN

To be clear, the arguments advanced so far are not meant to lead to any definitive conclusions about the use or disuse of incentives. One may consistently note all of the above, agree that incentives in certain cases have an inherently regrettable effect on our norms, and yet insist on incentivizing agents because it does so much good. Nevertheless, what I hope to show here is that reflection on the harms inherent in the effect of incentives on people's motivations can be productively applied to doctrinal analysis and legal design. Indeed, the reframing of the crowding out effect illuminates a novel mode of analyzing a range of legal phenomena.

An appreciation that the crowding out effect matters morally quite apart from its effect on behavioral outcomes is legally helpful in a variety of ways. First, certain features of legal doctrine can be partly explained or normatively justified by appeal to the moral insights canvassed in Part III. Second, the insights offer a new lens through which to compare and evaluate bright-line legal rules against more open-ended legal standards. Finally, I point to some other lines of legal application.

##### *A. The Law of Nature Restriction on Patentable Subject Matter*

The patentable subject matter inquiry helps to determine the eligibility of a proposed invention for patent protection. Whether an invention constitutes patentable subject matter is a threshold question that is wholly distinct (at least in theory) from questions concerning the novelty or usefulness of a proposed invention. Section 101 of the Patent Act defines the scope of patentable

subject matter as including “any . . . process, machine, manufacture or composition of matter.”<sup>82</sup>

Despite the broad language of § 101, courts have carved out exceptions to what can be patented. In particular, courts have held that “laws of nature, physical phenomena, and abstract ideas” are not appropriate subjects of intellectual property.<sup>83</sup> So, for instance, a naturally occurring bacterium, even if its discovery involved considerable efforts on the part of the discoverer, cannot be patented because it falls under the “physical phenomena” exception. Similarly, Einstein could not secure a patent for the theory of relativity.<sup>84</sup> Such discoveries are “manifestations of . . . nature, free to all men and reserved exclusively to none.”<sup>85</sup>

Naturally, such categorical exceptions have significant consequences for the integrity of the patent system as well as for scientific progress. “The rule against patenting nature denies monetary reward to some of the greatest discoveries. Einstein, Newton, Faraday, Pythagoras—even Prometheus—could expect short treatment from the Patent Office, because their ‘[e]poch-making ‘discoveries’” fell on the wrong side of principle and application.”<sup>86</sup> Insofar as the patent system is designed to encourage discoveries and inventions that benefit mankind, it is not at all obvious why society’s greatest benefactors should be denied reward. As a result, how the exception is to be understood principally and in relation to the rest of patent law doctrine becomes a pressing issue.

A popular policy rationale for the exception asserts that awarding the discoverer of a natural law (or abstract idea) a monopoly on its use would create too large a deadweight loss, on account of the limited access to the law, to justify creating the *ex ante* incentive. Laws of nature are regarded as “basic tools” necessary for research, and the foreclosure of private, unlicensed use of these basic tools would impose too much of a cost on society, making incentives in the domain of scientific investigation cost-prohibitive.<sup>87</sup>

82. 35 U.S.C. § 101 (2006).

83. See, e.g., *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

84. *Id.*

85. *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948).

86. Alan L. Durham, *Natural Laws and Inevitable Infringement*, 93 MINN. L. REV. 933, 950-51 (2009) (footnotes omitted).

87. See, e.g., *id.* at 958-59. See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003) (discussing the incentive-based underpinnings of intellectual property).

Alan L. Durham considers the “basic tools” explanation, along with other theories that have been offered to explain the doctrine, and persuasively argues that conventional explanations are highly unsatisfactory.<sup>88</sup> In many cases it is not at all obvious that the total deadweight loss of granting a temporary monopoly on a natural discovery would undermine the justification for awarding ex ante incentives to would-be discoverers. After all, the doctrine forbids the granting of patents *even if* the discovery of a natural law or abstract idea involved exceptional efforts that might otherwise go uncompensated. As the court in *Morton v. New York Eye Infirmary* observed, it does not matter “what long, solitary vigils, or by what importunate efforts, the secret may have been wrung from the bosom of Nature.”<sup>89</sup> The patentees in that case had discovered the principle of anesthesia! As Durham points out, “[t]he practical value of the discovery can hardly be overstated, as the surgeons who testified made plain.”<sup>90</sup> The court voided the patent, characterizing the discovery “as one concerning the natural effects of a known substance on the human body.”<sup>91</sup> Furthermore, Durham points out that broad claims—that is to say, claims that are likely to foreclose a wide range of useful unlicensed activity—are not disqualified, generally, as a matter of law. “Some ‘pioneering inventions,’ those that open up vast new possibilities, receive broad claims without demur.”<sup>92</sup> Hence, the justification for disallowing patents on “basic tools” of research cannot appeal exclusively to the broadness of the patent claim.

Durham considers alternative justifications for the doctrine, including ones that derive from the natural law tradition.<sup>93</sup> I cannot present here in a clear or convincing manner all of his various critiques, or his own view that the

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88. See Durham, *supra* note 86, at 960 (“Disallowing patents to natural laws and phenomena might withhold necessary incentives at the very point where they are most needed, while failing to protect those willing to share their discoveries.”); see also Rebecca S. Eisenberg, *Wisdom of the Ages or Dead-Hand Control? Patentable Subject Matter for Diagnostic Methods After In re Bilski*, 3 CASE W. RES. J.L. TECH. & INTERNET, no. 1, 2012, at 1, 7 (“[C]urrent patentable subject matter doctrine suffers from a lack of clarity not only as to what the applicable rules are, but also as to what those rules are supposed to accomplish.”).

89. *Morton v. N.Y. Eye Infirmary*, 17 F. Cas. 879, 884 (C.C.S.D.N.Y. 1862).

90. Durham, *supra* note 86, at 951.

91. *Id.*

92. *Id.* at 958 (footnotes omitted).

93. See Durham, *supra* note 86, at 948–61; see also Alan L. Durham, *The Paradox of “Abstract Ideas,”* 2011 UTAH L. REV. 797, 844–50 (considering the following explanations for the exception: abstract ideas are not “invented” in the right way; they are not useful; the associated claims are too broad; the subject matter represents a basic tool of research).

doctrine might be justified by appeal to the fact that it would be very hard to distinguish as a legal matter economically exploitative uses of patented natural phenomena from uses that were inevitable and harmless to the patentee.<sup>94</sup> What I would like to do instead is explore a way of solving the puzzle about patentable subject matter that the existing literature appears to have neglected.

A rule that denies patents to discoverers of natural laws, physical phenomena, and abstract ideas, may serve as a means for reinforcing and preserving the valued motivations that underpin efforts in the arena of basic science. The motivations of the great theorists (and other participants in the scientific enterprise)—motives like the love of knowledge for its own sake, an interest in the general welfare, and the desire to exercise one's intellectual faculties—may need insulation from the crowding influence of monetary incentives. We clearly cherish the fact that our intellectual culture breeds theorists and discoverers who adopt values greater than monetary gain, values that we think are intrinsically worth having.<sup>95</sup> Theorists like Einstein acquire heroic status because they inspire us with their single-minded devotion to the cause of humanity and scientific progress for its own sake. It is the very possibility of that heroic identity—one constituted by and valued for a set of motivational concerns—that is endangered by a patent regime that introduces incentives in the arena of basic science.<sup>96</sup>

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94. See Durham, *supra* note 86, at 983 (“None of the cases on patentable subject matter, even those dealing with ‘mental steps,’ pose this issue of the unwilling infringer paralyzed by the burden of knowledge.”).

95. In fact, Durham briefly considers the possibility that what justifies withholding incentives from some of society's greatest discoverers is that “higher interests than monetary reward” motivate theorists like Einstein and Faraday. *Id.* at 953. Durham dismisses that possibility far too quickly, on the (mistaken) grounds that it would seem unnecessary to create a doctrine blocking their pursuit of patents if most discoverers of natural laws and physical phenomena were motivated by higher interests. *Id.* at 953–54 (“[I]f scientists of Einstein's caliber were indifferent to financial gain, it would seem unnecessary to create rules that denied them patents they did not seek.”). The aspects of the crowding out effect emphasized in this Note represent considerations Durham neglects. It may be necessary to create rules denying discoverers patents precisely in order to protect their motivations from crowding out effects.

96. In 2006, the Russian mathematician Grigory Perelman became legendary upon turning down the prestigious Fields Medal and a million-dollar-prize for proving the Poincaré Conjecture. His explanation: “Everybody understood that if the proof is correct then no other recognition is needed.” John Allen Paulos, *He Conquered the Conjecture*, N.Y. REV. BOOKS, Apr. 29, 2010, <http://www.nybooks.com/articles/archives/2010/apr/29/he-conquered-the-conjecture>.



Perhaps, then, the way to think about the natural law and physical phenomena restriction on patents is by appeal to the fact that we wish to preserve the unique norms that govern the scientific enterprise. Note that this justification is resilient to the consideration that incentives might get us more of the socially desirable discoveries we care about, even in the natural sciences. I have no doubt that financial gain may serve as a powerful motivating force, perhaps more powerful than such virtues as a love of truth and beauty for its own sake. Nevertheless, more scientific progress, in that case, would come at the cost of transforming the valued norms that govern the enterprise of basic science. The crowding out effect would threaten to make less common theorists who serve as an example—through their uncanny curiosity, sense of altruism, and singular investment in the great project of mankind—for how individuals should try to orient their lives. It would undermine the motivations and ways of valuing that we think are inherently good for agents to have, and, in our best moments, aspire to have ourselves.

The above explanation for the natural law exception may at best be a partial justification for the rule. Certainly, judges need not be acting out of the concerns I have raised. Nevertheless, even if the explanation I have offered here fails as a positive account of why we have the patent regime that we do, it represents an original normative insight into the natural law restriction, one that gains in plausibility when we fully reflect on the importance of preserving (and promoting) the intellectual virtues.

*B. The Unenforceability of Donative Promises that Have Not Been Relied Upon*

The unenforceability of a promise to gift that has not been relied upon by the promisee represents one of the foundational principles of contract law. The standard analysis of the doctrine derives from the law and economics tradition. Scholars in that tradition argue that the law reflects a (justified) skepticism about the efficiency and value of gift giving, and, by refusing to enforce donative promises, enshrines a policy determination that gifts are “unworthy of being encouraged by the law.”<sup>97</sup> Alternatively, one finds in the economics literature various permutations and developments of the view, famously espoused by Lon Fuller,<sup>98</sup> that courts would face significant problems of

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97. Robert A. Prentice, “Law &” *Gratuitous Promises*, 2007 U. ILL. L. REV. 881, 895-96 (noting scholars who view gifts as a “drag on the economy”).

98. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

process if they were to enforce promises to gift.<sup>99</sup> A promise to gift is a gratuitous promise lacking in consideration—after all, the promisor does not expect to receive anything in return—and consideration plays an “evidentiary” function in contract law, by confirming that a promise was in fact made.<sup>100</sup> The formality of requiring that promises, and contracts generally, be backed by consideration also serves a “cautionary” function—it forces the parties to reflect on what they are doing—as well as a “channeling” function—it is a means for parties to signal to courts that the contract is legally enforceable. The consideration requirement thus creates a procedural convenience for courts, which renders gratuitous promises to gift unenforceable.

The law and economics tradition has been critiqued in the literature for ignoring the way in which gifts are a valuable social good, and recent scholarship has developed an alternative explanation for the rule.<sup>101</sup> Scholars have argued that legally enforcing a promise to gift destroys the “giftness” of the transaction and removes the benefit that promisees derive from the gift-giving activity.<sup>102</sup> Enforcing the gift-promise “kills” the gift, because the value of gifts derives from the fact that they are motivated by “affective values like love, friendship, kindness, gratitude, and comradeship.”<sup>103</sup> Melvin Eisenberg, for example, observes that

[u]nder an enforceability regime, it could never be clear to the promisee, or even to the promisor, whether a donative promise that was made in a spirit of love, friendship, affection, or the like, was also performed for those reasons, or instead was performed to discharge a legal obligation or avoid a lawsuit.<sup>104</sup>

The analysis of these modern writers is essentially *synchronic*, which is to say that it focuses on the single time-slice of the gift-giving act. The law, they point out, changes the reasons why the gift-giver complies with the promise, when it forces compliance. One potentially devastating objection to their view proceeds from the observation that the law merely changes the reason why the

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99. See generally Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821, 823 (1997) (reviewing attempts to explain the doctrine that appeal to the problems of process involved in enforcing gift-promises).

100. Fuller, *supra* note 98, at 800.

101. See, e.g., Prentice, *supra* note 97, at 932-33.

102. *Id.* at 934-35.

103. *Id.* at 934.

104. Eisenberg, *supra* note 99, at 848.

gift-promisor *ultimately* complies with the gift-promise. The initial promise may well remain grounded in motivations like love and affection; those original motivations might be all that the beneficiary cares about, or else may be sufficient to preserve some of the value that resides in the gift-transaction. The law, this line of thought goes, only binds the hands of those who have a change of heart, and by doing so may even enhance the meaning and value of the initial gift-promise, considering that under an enforceability regime, a gift-promise reveals even more affection and kindness in virtue of the fact that it legally binds the promisor.

The considerations that have been advanced in this Note can reinforce modern views that analyze how the motivation-changing effect of enforcement undermines gift giving, and also protect these views from the line of response developed above. A *diachronic*, rather than synchronic, focus on the effects of an enforceability regime on the gift-transaction, that is to say, a focus on the effect of legal incentives on the motivations of gift givers *over time*, further emphasizes how legal enforcement undermines the value of gift-giving. If people routinely comply with gift-promises out of legal considerations, this not only changes the motives that govern those particular instances of compliance, but can also be expected to, over time, crowd out the norms and motivations that make gifts valuable. Once a gift-promise has been made, the promisor, under the current “under-incentivized” regime, must rely on her intrinsic motivations—her love and affection for, and kindness towards, the promisee—to make sure that she follows through with the promise.

In this way, the current regime forces promisors to exercise the motivations that we care about. Quite apart from the fact that delivering on a gift promise out of a fear of legal sanction partially changes the meaning of that particular transaction between the gift giver and beneficiary—a dimension that theorists have explored—the routine influence of legal incentives on gift giving behavior may altogether shift our personalities in a direction we would later regret; a direction that undermines ways of relating amongst individuals that ought to be preserved.

### C. *The Declining Popularity of Heart-Balm Laws*

The breach of a promise to marry was once a prominent quasi-contract, quasi-tort cause of action, created by the English ecclesiastical courts and absorbed into English and American common law, through which a breaching

party could be liable for punitive damages.<sup>105</sup> The suits were most commonly employed by “scorned” would-be brides, and frequently included arguments that an engaged woman suffers a real harm from wasting her time in the marriage market, enduring possible humiliation, and suffering loss of reputation; additionally, she may have slept with the man under the false expectation of a future marriage.<sup>106</sup> As the Seventh Circuit more recently observed, “the action was originally used to pressure a reluctant lover into fulfilling a marital promise.”<sup>107</sup>

In the twentieth century, the cause of action fell into disfavor. Many states passed laws prohibiting the enforcement of “heart-balm” actions.<sup>108</sup> Courts began repealing the cause of action by judicial intervention.<sup>109</sup> The reasons cited for the change of heart (no pun intended) included the fact that the cause of action had been “subject to grave abuses” and had been used as “an instrument for blackmail by unscrupulous persons.”<sup>110</sup> Courts cited the large damages routinely awarded,<sup>111</sup> as well as the importance of freedom of personal choice in matters of marriage and family life.<sup>112</sup> There was a growing recognition that the “ideals that the action served . . . [were] anachronistic.”<sup>113</sup> Nevertheless, many jurisdictions continue to permit the cause of action.<sup>114</sup>

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105. See *Stanard v. Bolin*, 565 P.2d 94, 96 (Wash. 1977) (observing that the cause of action for a breach of a promise to marry recognizes tort-like damages).

106. See Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203, 204-05 (1990).

107. *Willey v. Springs*, 47 F.3d 1475, 1479 (7th Cir. 1995).

108. See, e.g., *Breach of Promise Act*, 1947 Ill. Laws 1181 (codified at 740 ILL. COMP. STAT. ANN. 15 (West 2013)); see also H.S., Note, *Anti “Heart-Balm” Legislation*, 11 TEMP. L.Q. 396 (1936).

109. See, e.g., *Gilbert v. Barkes*, 987 S.W.2d 772 (Ky. 1999) (eliminating the common law cause of action).

110. *Breach of Promise Act* § 1.

111. Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770, 1773-74 (1985).

112. See, e.g., *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (gleaning from statutes and judicial decisions that refusing to enforce prior agreements to marry enhances the “freedom of personal choice in matters of marriage and family life” (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977))); Kelsey M. May, Comment, *Bachelors Beware: The Current Validity and Future Feasibility of a Cause of Action for Breach of Promise to Marry*, 45 TULSA L. REV. 331, 333-34 (2009) (“[B]reach of promise to marry’ . . . disregards the freedom that should be afforded to a non-married individual in his private romantic relationships . . .” (footnote omitted)).

113. *Willey v. Springs*, 47 F.3d 1475, 1479 (7th Cir. 1995).

114. See DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 414 (2d ed. 2009); May, *supra* note 112, at 332 (observing that the cause of action survives in twenty-two states).

The relevant reason for the decline in popularity of the cause of action for our purposes is the growing recognition amongst courts and legislatures of the importance of “freedom of choice” in marriage and their discomfort at the thought that the cause of action was often employed to threaten reluctant lovers into marriage. Concerns about economic coercion may well be the principal reason underlying the discomfort of contemporary lawmakers. But heart-balm laws appear even less justified when one considers the fact that the way that freedom of choice is exercised when marriage occurs in the ideal—through motives of love and affection—is *itself* valuable, and that it is less than desirable for the law to crowd out motives and ways of relating in the marital domain that are worth reinforcing by allowing them their free and unrestricted exercise.

Even though individuals typically have a complex set of reasons for marrying, and often marriage is entered into for reasons of convenience, it seems quite natural to think that marriage in the ideal is an association between two people characterized by love and affection. A legal system that undermines the possibility of that ideal association, or distorts away from the ideal, is regrettable. We care about why people enter into marriage, and if legal incentives to fulfill a promise to marry distract from or altogether substitute for the motivations we care about—the motivations that constitute the good of marriage—then they may not be worth it.

#### *D. Rules Versus Standards*

The preceding discussion demonstrates that an appreciation of how our motives matter generates insights into features of the law of patents, contracts, and torts. Doctrinal rules can be rationalized by appeal to the idea that the crowding out effect of incentives militates against their application in spheres of human activity that are governed by valued non-legal norms and motivations.

To further demonstrate the benefits of being attentive to the intrinsic value of norms, I consider a question of law with trans-substantive significance. The question concerns the use of bright-line legal rules rather than more open-ended standards to guide individuals subject to the law’s demands. The general lesson of this Section is that the intrinsic value of norms can inform the selection of the form that legal directives take. Even where legal incentives are in play, there are ways of mitigating the morally regrettable effect on valued motivations, and that is where the choice between rules and standards becomes relevant.

In clarifying what the law requires, judges and legislators often have to decide whether to couch legal directives in the language of standards or rules.

Standards have the feature of being open-ended and abstract. They often incorporate such value-laden concepts as “reasonableness,” or “competency,” or “wrongfulness.” Determining how standards apply to a particular situation to generate specific prohibitions often requires extensive fact-based and normative analysis. In other words, “interpreters have to do a great deal of work” to generate the relevant content of a standard-like legal provision.<sup>115</sup> Bright-line rules, on the other hand, are more determinate and absolute. They give clear instructions about how individuals are to act to stay within the bounds of the law, and their interpretation does not require the elaborate application of normatively thick concepts. A ban on “unreasonably fast” or “excessive” driving would be described as a standard, whereas a prohibition against driving over sixty miles per hour counts as a rule. Undoubtedly, there are difficult cases that share features of both rules and standards, but the two categories are nevertheless a helpful means for distinguishing legal directives according to their form.

The comparative performance of rules versus standards has been extensively discussed in recent scholarship.<sup>116</sup> For instance, Duncan Kennedy observes that “the two great social virtues” of bright-line rules are that they limit uncertainty and official arbitrariness.<sup>117</sup> Private actors know well in advance of official intervention what the law requires of them, and they adjust their activities accordingly. Moreover, rules limit the risk of abusive exercise of judicial discretion. On the other hand, rules are often criticized for being excessively conservative and for leading to the wrong result when unanticipated circumstances arise, because rule-makers cannot foresee all the various situations in which their rules will be applied.<sup>118</sup> Incompletely specified and normatively thick standards compensate for the deficiencies of rules, but forgo their various virtues, such as certainty and protection against arbitrary application.

My purpose here is not to evaluate the merits and demerits that have already been identified in the literature, but to illuminate a new dimension to the comparison. Standards have an ignored advantage over rules in certain

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115. Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 965 (1995).

116. For a comprehensive account of the rules versus standards debate, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-713 (1976); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56-69 (1992); and Sunstein, *supra* note 115, at 969-95.

117. Kennedy, *supra* note 116, at 1688.

118. See Sunstein, *supra* note 115, at 957.

contexts, one that is tied to the intrinsic importance of the character of our motivations. When the law prohibits or encourages actions, the punitive or monetary incentives generated often crowd out “higher motives” for desirable behavior, and sometimes this is inherently regrettable. The substitution effect of motivations undermines character and ways of relating with each other that we care about. Normatively rich legal standards have the virtue of mitigating the crowding out effect, and that is one powerful reason for their use in contexts where we think that non-legal motives are especially worth preserving.

Standards, recall, have the feature of often incorporating moral concepts into the legal directive, so that interpreters have to engage in normative reflection in order to determine what the law requires. Standard-like directives that forbid “wrongful misappropriation” or “unfair use” or “unreasonable speed” place moral demands on the interpreter, whether the interpreter is a judge or a private actor. To determine what the law requires, the interpreter must engage in normative deliberation. This feature of standards, I contend, makes them reinforce the norms we care about, or at least mitigate the crowding out effect, by forcing actors to think about non-legal reasons for refraining from or engaging in a particular action. In contexts where the relevant non-legal reasons generate wellsprings of action that we think are worth preserving, an argument emerges for their application over rules.<sup>119</sup>

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119. Seana Shiffrin makes a similar observation when she argues that standards are likely to induce moral deliberation in agents: “Rather than applying a rule by rote, citizens must ask themselves . . . whether they are treating one another fairly . . . .” Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1217 (2010). Shiffrin contends that this facilitates the development of moral awareness and “character traits strongly associated with democratic citizenship.” *Id.* at 1233.

My own view is developed in a very different context, and draws a sharper contrast between rules and standards. My interest in standards connects with their ability to mitigate an effect that rule-based directives have—a change in the reasons why (or the motives upon which) individuals act. The urgent dilemma facing lawmakers that I draw attention to is their wanting, on the one hand, to ensure that adequate legal incentives exist in some domain for agents to engage in socially desirable conduct, and wanting, on the other, to preserve valued modes of motivational concern. Standards (uniquely) offer something of a way out of this dilemma. A failure to deploy standards in such contexts involves the frustration of a real policy interest due to the crowding out effect of legal directives.

In fact, recognizing the law’s potential for crowding out valued motives is essential to the broader point that both Shiffrin and I want to make. Although Shiffrin does not address it, her thesis *requires* that standard-based directives be immune from crowding out effects of the sort that laws generally induce, given the importance of good motives to the formation of moral character. *See supra* Part III.

To explain the thought by way of example, consider a rule developed by courts that interprets the Fourth Amendment—which prohibits unreasonable searches and seizures—in the context of police detention of a subject incident to a search of his home.<sup>120</sup> Suppose that the rule states that when the police search a home pursuant to a warrant, they can detain a person incident to that search only *inside* or *immediately outside* the home. Such a rule might be distinguished from a more open-ended standard that states, for instance, that a suspect can only be detained incident to a search of his home if the detention takes place *as soon as is reasonably practicable*. These contrasting interpretations of the Fourth Amendment’s requirements have, in fact, been extensively debated by the various circuits, as well as the Supreme Court.<sup>121</sup> Notice that the “standard” requires officers to reflect on what is and is not reasonable regarding the detention of suspects. In deciding how long to delay before approaching a suspect departing from his or her home, officers must ensure that their conduct is governed by *reasonable* considerations. Reasonable considerations might include a genuine fear of confronting the suspect in full view of neighbors. On the other hand, officers would likely be prevented from delaying merely to make the situation uncomfortable for the suspect. The standard forces officers to reflect on the reasonableness of their decisions in the field and cultivate positive habits. The bright-line rule short-circuits the cultivation of habitual reasonableness by telling officers exactly what they can or cannot do. My proposal, here, is that the standard reinforces norms we care about—moral norms of behaving *reasonably*—and thereby mitigates the crowding out effect of the legal incentive.

Perhaps a more illuminating example would draw on the legal prohibition against “improper” or “wrongful” use of trade secrets. Unlike other forms of intellectual property law, trade secret law imposes liability only for *improper* acquisition of secrets.<sup>122</sup> While the Uniform Trade Secrets Act lists various acts

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120. See U.S. CONST. amend. IV.

121. Compare *Bailey v. United States*, 133 S. Ct. 1031 (2013) (holding that a departing suspect may only be detained in the immediate vicinity of the premises to be searched), *with id.* at 1045 (Breyer, J., dissenting) (arguing for a standard allowing detention as soon as reasonably practicable), and *United States v. Montieth*, 662 F.3d 660, 666 (4th Cir. 2011) (adopting an “as soon as practicable” standard).

122. See, e.g., UNIF. TRADE SECRETS ACT § 1(2), 14 U.L.A. 537 (amended 1985) (defining misappropriation as the “acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means”); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 (1995) (defining misappropriation as



that are considered improper, such as theft, fraud, or a breach of a duty of confidentiality, the list is non-exhaustive.<sup>123</sup> Courts have interpreted the wrongful use doctrine in creative ways to restrain, for instance, a defendant from taking aerial photos of activities at a competitor's manufacturing plant.<sup>124</sup> The fact that trade secret law has an open-ended "wrongfulness" standard at its very center is often justified by appeal to one of the principal policy goals underlying the trade secret regime: the maintenance of "standards of commercial ethics,"<sup>125</sup> the enforcement of "morality in business,"<sup>126</sup> and the promotion of "fair dealing"<sup>127</sup> amongst competitors. Considering the acknowledged importance of preserving ethical conduct in the commercial sphere, one might wonder whether the presence of legal incentives undermines the policy goal of trade secret law – after all, if competitors refrain from stealing hard-earned secrets simply out of a fear of damages, then the evidence suggests that whatever uniquely *ethical* motivations they might have for competing fairly may be crowded out. This is where trade secret law's use of a standard is (perhaps unintentionally) helpful. The standard forces participants in business to reflect on what is or is not fair in order to determine what the law requires of them. Trade secret law's directive, in other words, *demand*s moral reflection, and the exercise of ethical considerations.

Let me defend my hypothesis by appeal to some recent empirical research. Yuval Feldman and Doron Teichman show that when the law raises the costs of undesirable activity in a probabilistic way, the crowding out effect

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"acquir[ing] by means that are improper . . . information that the actor knows or has reason to know is the other's trade secret").

123. UNIF. TRADE SECRETS ACT § 1.

124. See *E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1017 (5th Cir. 1970) ("We . . . need not proclaim a catalogue of commercial improprieties. Clearly, however, one of its commandments does say 'thou shall not appropriate a trade secret through deviousness . . .'").

125. *Ed Nowogroski Ins., Inc. v. Rucker*, 971 P.2d 936, 942 (Wash. 1999) ("A purpose of trade secrets law is to maintain and promote standards of commercial ethics and fair dealing in protecting those secrets.").

126. *Abbott Labs. v. Norse Chem. Corp.*, 147 N.W.2d 529, 533 (Wis. 1967); see also *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974) (noting that the maintenance of standards of commercial ethics is a broadly stated policy behind trade secret law); *E. I. duPont*, 431 F.2d at 1016 ("[O]ur devotion to freewheeling industrial competition must not force us into accepting the law of the jungle as the standard of morality expected in our commercial relations.").

127. *Nowogroski*, 971 P.2d at 942.

diminishes.<sup>128</sup> A regime that asks individuals to pay upfront in order to engage in a particular kind of behavior has a very different effect on intrinsic motives than a regime that orders payment after the fact and only if the party is caught. In the latter regime, the crowding out effect is attenuated. Feldman and Teichman offer their own hypothesis for why we observe this attenuation. They think that uncertain costs make the payment seem more like a punishment, which makes the morality of the act salient. In contrast, certain and upfront payments induce in agents the belief that they can purchase the right to engage in socially undesirable behavior. My interpretation of the results is subtly different. I suspect that in a regime in which the legal consequences of undesirable behavior remain somewhat uncertain, the actor is offered an opportunity to think about non-legal reasons that bear on the act. In other words, the crowding out effect diminishes because the uncertainty gives non-legal reasons and motives a chance to operate. The virtue that I claim standards possess derives precisely from their open-textured and indeterminate nature, and, in particular, from the indeterminacy generated by engrafting normative concepts into their core.

Even if standards have the potential for facilitating normative deliberation in the way that I suggest, the concern might be raised that private actors are unlikely to engage in private deliberation about the meaning of standards because they defer to interpretations of the law espoused by superiors or counsel—interpretations that are based entirely on the anticipated construal by courts of what standards permit. In particular, my suggestion that officers are likely to reflect on what is and is not reasonable regarding the detention of suspects when a standard exhorts them to behave reasonably might seem especially oblivious to the realities of how police internalize the law.

There are several things to say in response to this worry about outsourcing of standard-interpretation. First, it is not at all obvious that the operative determination by private and institutional actors of what the law requires of them always occurs *after* the involvement of counsel. Second, legal advice cannot eliminate the necessary uncertainty that standards generate with respect to what the law specifically requires. There will undoubtedly be exigencies where guiding precedent is radically under-determinative, and where all that is known about the law is that courts will apply a standard of reasonableness or fairness. Counsel may well communicate that residual uncertainty to private actors, which might be enough to allow for the exercise of valued non-legal norms and motivations. Private actors may find it more efficient to simply

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128. Feldman & Teichman, *supra* note 42, at 225.

cultivate the relevant virtues instead of always trying to act based on predictions of what a court will interpret the law to specifically require. Third, even if it is presently true that involvement of counsel precludes the benefits that I claim standards possess, this is, after all, an artifact of existing lawyering norms. My analysis, at the very minimum, suggests a possible state of affairs that may be harnessed with the cooperation of lawyers and other legal actors. It is hardly idle fantasy to think that lawyers can advise their clients while fostering in them a sense of responsibility for internalizing legal standards. Consider the example of the tax bar during the 1940s and 1950s, a period in which the marginal tax rate was above ninety percent for the highest income bracket.<sup>129</sup> In this neglected era, the tax bar stressed the tax lawyer's duty to the state, and saw itself as morally responsible for fostering amongst taxpayers a desire to conduct their tax affairs "as honorably and ethically as the adviser would himself act under similar circumstances."<sup>130</sup> In the interpretation of tax doctrine—which is, it should be noted, replete with standards—tax lawyers encouraged clients to consult their conscience. Experience suggests, therefore, that lawyers can very much play an active role in helping private and institutional actors internalize the normative attitudes—habits of reasonableness and fairness—that the law, by announcing a standard, expects those subject to its demands to cultivate.

Finally, the concern that deference to counsel prevents legal standards from promoting virtuous modes of motivational concern can be avoided altogether if we consider cases where standard interpretation cannot be outsourced. The most obvious example of such a case involves the enforcement of lawyering ethics by way of Rule 11 sanctions. The Federal Rules of Civil Procedure oblige lawyers to conduct an enquiry into the law that is "*reasonable* under the circumstances" and to refrain from advancing baseless factual or legal contentions.<sup>131</sup> Lawyers must interpret the standard in their own case, and, in so doing, cultivate habits that conform to the reasonable efforts required by the law. The example provides further opportunity to emphasize the broader point. It seems especially appropriate for lawyers to be motivated by a sense of professional responsibility for its own sake wholly apart from the instrumental ends this mode of motivation enables, such as the avoidance of Rule 11

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129. See Michael Hatfield, *Legal Ethics and Federal Taxes, 1945-1965: Patriotism, Duties, and Advice*, 12 FLA. TAX REV. 1, 3 n.5 (2012).

130. *Id.* at 10, 15-21 (quoting Norris Darrell, *Conscience and Propriety in Tax Practice*, 17 N.Y.U. ANN. INST. ON FED. TAX'N 1, 23 (1959)).

131. FED. R. CIV. P. 11(b) (emphasis added).

sanctions, and the efficient administration of the legal system. The privilege to practice law requires attorneys to conduct themselves in a manner compatible with the administration of justice, which may well involve adopting an attitude towards their work that reflects appropriate respect for the legal system. The extent to which standards facilitate the inculcation of appropriate values amongst lawyers thus militates in favor of their application over rules.

The insight that the incentive-driven undermining of norms is often inherently bad can thus inform the selection of legal form. In contexts where reinforcing ethical and intrinsic concern is important, standards have an advantage over bright-line rules. Standards may mitigate the regrettable effect on intrinsic motivation by enabling the exercise of non-legal reasons for acting.

#### *E. Uncharted Waters: Moral Edification Through the Crowding Out Effect*

A research paradigm that explores the effect of incentives on inherently valuable motives can be fruitfully applied to other questions of law and policy. I have not had occasion, in this Note, to discuss many other possible lines of practical application. I gesture in the direction of some of these possibilities in this final Subsection that I think deserve brief (if not fully satisfying) mention.

Perhaps paradoxically, there may be cases in which *extrinsically* motivating agents, and triggering the crowding out of intrinsic or non-legal motivation, may be the right thing to do, and precisely in virtue of the motivational transfer. This possibility only has the appearance of a paradox because the discussion so far has focused on the value of classically *intrinsic* forms of motivation, such as affection for others, or a love of knowledge. There may be activities, however, that are most appropriately pursued *out of a sense of legal obligation*. Citizens extrinsically motivated to engage in those activities may undergo a normative improvement.

Consider, for instance, laws that demand acts that are economically redistributive. One might worry that a tax regime that creates sanction-based incentives for the wealthy to support the poor crowds out charitable motivations in the rich. But, in fact, it is not entirely clear which way the crowding out effect cuts in this special case. Getting citizens to view their financial contribution to the least well-off as a *legal obligation* may yet be preferable to having them view it merely as a means for satisfying their charitable urges. One could argue—as some have<sup>132</sup>—that the legal obligation

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132. Ryan Thoreson, *The Unkindness of Strangers*, HUFFINGTON POST (Oct. 19, 2012, 4:23 PM), [http://www.huffingtonpost.com/ryan-thoreson/mitt-romney-women\\_b\\_1989354.html](http://www.huffingtonpost.com/ryan-thoreson/mitt-romney-women_b_1989354.html).

would generate a more reliable pool of resources for the poor—but that would reflect the familiar line that extrinsic motives are often better at getting us the socially valued outcomes we care about. A mode of normative argument more harmonious with this Note's paradigm would observe that respect for the law is *inherently* a normatively better source of motivation than feelings of charity in this special case. In making its case, that argument would need to engage in a serious way with the nature of law; it would need to use a theory of legal obligation to show that regarding one's financial support to the poor as a legal obligation is the more virtuous and normatively accurate way of regarding one's contributions. I can only sketch here how that argument might go.

The obligation to support the economically deprived is unlikely to be a "solipsistic"<sup>133</sup> moral imperative—one that derives from the contingent demands that our internal capacities for empathy place on us. Instead, the obligation likely derives from the fact that we choose to live together in society with each other and under terms of social ordering that treat all members as free and equal. Perhaps, the obligation is best experienced as a *demand* that other members of society can rightly place on us. Suppose that some citizens learn to respect the law precisely because it represents the terms of social ordering necessary for fair communal living. Certainly, when people act out of a sense of legal duty, they often do so not merely out of a fear of sanction by the state, but out of a sense that the law is worth respecting because of the normative ideals it represents—it enforces demands that members of society can justly place on one another. In those cases, individuals who are made to see their contributions to Social Security as acts required by law rather than acts motivated by their sense of charity *improve* their way of regarding the act of financial giving; the motivational change—in this case, from intrinsic to extrinsic—represents a normative improvement on its own terms.<sup>134</sup> Individuals who view their contributions as (strictly optional) expressions of charity, motivated by pity for the poor, are, on this view, making a fundamental moral mistake—and correcting that mistake has inherent value. The law can thus be employed strategically to refine our sense of the grounds of our obligations to each other.

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133. In describing the imperative as solipsistic, I am merely drawing attention to the way in which the object of empathy (or pity, for that matter) is regarded by a morality that derives all its force from the sentiment of sympathy—persons may be given an incomplete existence by this form of regard, one that fails to recognize their full capacities and standing to issue valid demands on us.

134. I am indebted to Daniel Markovits for alerting me to this line of inquiry.

Admittedly, the precise benefit I am identifying is captured only if the taxpayer complies with the law with the right attitude of respect for it. Those who begrudgingly pay their taxes out of fear of sanction may not experience a motivational improvement. If so, then the example is, perhaps, best understood as reinforcing the need to encourage compliance with the law out of respect for its ideals. It seems worth noting, however, that insofar as expressions of charity have a patronizing component, one that portrays the poor in an undignified light, even sanction-based compliance might count as a normative improvement, given that it prevents the taxpayer, who would otherwise act on pity-based motivations, from taking a condescending attitude towards the economically deprived—an attitude we might believe for good reasons to be less than virtuous.

There are still other possibilities that this Note's mode of analysis illuminates that I have not explored for reasons of space.<sup>135</sup> Nevertheless, I hope to have inspired interest, with the examples I've discussed, in the non-instrumental analysis of the crowding out effect, and its application to the law. Incentives are undoubtedly a powerful instrument in the regulatory tool-kit. Attending to their neglected but morally significant effects on our motivational psychology is important precisely because of their pervasive use.

## CONCLUSION

In this Note, I have emphasized a neglected normative dimension to a fact about legal incentives—namely, the fact that incentives crowd out intrinsic and non-legal reasons for acting. The crowding out effect is often regrettable because our motives and non-legal reasons for doing things matter inherently. Our motivations constitute who we are, and we have an interest in cultivating certain dispositions and habits for their own sake. Moreover, valued forms of caring—love, affection, reciprocal respect—enable valued ways of relating to others. In light of these considerations, the motivational transfer that occurs because of monetary incentives, and more generally when legal rules and regulations induce human behavior, often represents an inherently bad outcome.

This reframing of crowding out theory can be fruitfully applied to the analysis of legal doctrine, and to questions of legal design. I have shown that

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<sup>135</sup>. For instance, it may be possible to defend policies that erode financial incentives for hard work by appeal to the importance of drawing on the higher motives that individuals remain capable of.

our reluctance to implement legal incentives in certain spheres of human conduct—the scientific enterprise, marital relations, and gift-giving—may be explained by appeal to our interest in preserving the non-legal motives and norms that govern in the absence of legal intervention. I have also shown that in various contexts, standards, as a legal form, have a special advantage over bright-line rules, insofar as they counter the crowding out effect of legal directives. This advantage becomes apparent when we take seriously the notion that the preservation of non-legal motivation is both necessary and requires the routine exercise of our virtues. I have briefly considered other legal insights that come from taking the phenomenon seriously. The combined effect, I hope, is to generate interest in a research paradigm that studies how a non-instrumental moral analysis of the crowding out effect can contribute to debates about what the law should be.